No. 2864

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE J. HATFIELD,
Attorney for Plaintiff in Error.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

INDEX.

No. 2864

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I. STATEMENT OF CASE AND SPECIFICATION OF ERROR RELIED ON.

The plaintiff in error (the defendant below) was convicted of a violation of the Act of February 9th, 1909, as amended January 17th, 1914. Specifically she was convicted of having on the 12th day of August, 1915, at San Francisco, concealed and facilitated the transportation and concealment after importation of 660 five-tael cans of opium prepared for smoking purposes, which she then and there well knew had been imported into the United States contrary to law.

At the trial the District Court instructed the jury in regard to the Act of February 9th, 1909,

under which the plaintiff in error was convicted. Plaintiff in error contends that the trial court erred in giving its instruction. Especially plaintiff in error relies upon the fourth specification of error set forth in the "Assignment of Errors on Writ of Error of Defendant Ng Choy Fong" as follows:

> "That the Court erred in charging the jury: 'That act under which this prosecution is had is as follows: "That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasurer is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.'
>
> 'Sec. 2. *That if any person shall fraudulently or knowingly* import or bring into the United States, or assist in so doing, and opium or any preparation or derivative thereof contrary to law, or (and this is the portion with which we are here concerned) shall *receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law,* such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished,—as provided. *Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof such possession shall be deemed suffi-*

cient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.'

'Sec. 3. *That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found (78) within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.*''

These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the Government prove that the defendants had after July 1st, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1st, 1909,—and such possession imputed to the defendants a guilty knowledge sufficient to warrant a conviction, unless the defendants shall explain such possession to your satisfaction. If therefore you are satisfied from the evidence beyond a reasonable doubt that defendants did have possession of this opium, and that it was smoking opium, then such possession will be sufficient a warrant a conviction, unless the defendants have explained such possession to your satisfaction.' '' (Italics here and elsewhere ours.) (Transcript of Record, pages 89-91.)

Plaintiff in error contends that the trial court erred in giving that portion of the instruction which is above italicized. In short it is the contention of plaintiff in error that that portion of the Act of February 9th, 1909, which provides that all smoking opium found within the United States shall be presumed to have been imported after

April 1st, 1909, and that possession of such opinion shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession satisfactorily, is unconstitutional and void as being violative of Article V of the Amendments to the Constitution of the United States.

This article provides that "no person * * * " shall be compelled in any criminal case to be a " witness against himself; nor deprived of * * * " liberty * * * without due process of law." Plaintiff in error contends that the Act of February 9th, 1909, in raising the presumption that any smoking opium found in the United States was imported after April 1st, 1909, and making possession of such opium sufficient evidence to authorize conviction unless the defendant shall explain the possession to the jury's satisfaction, strips the defendant in a criminal prosecution under that act of the protection of the inviolable presumption of innocence guaranteed by "the due " process of law" clause and tends to compel the defendant to take the witness stand whether he wishes to or not, at the peril of being convicted of a crime not proved against him.

The Act of February 9th, 1909, in Section 1, provides that it shall be unlawful to import opium into the United States *after the first day of April, 1909.*

Section 2 of the Act provides that anyone who shall *fraudulently* or *knowingly* receive, conceal, or in any manner facilitate the transportation or con-

cealment of such opium (that is opium imported into the United States after the first day of April, 1909) shall be guilty of a violation of the Act and shall be punished by fine or imprisonment or both.

The essential elements of the crime defined by this Act are three:

(1) That the opium be imported into the United States after April first, 1909;

(2) That the defendant actually receive, conceal or in some manner facilitate in the transportation or concealment of such opium;

(3) That the defendant knows at the time the defendant commits the overt act that the opium was imported into the United States after April 1st, 1909.

There is absolutely not one iota of evidence in the case at bar that the 660 five-tael cans of opium found in the possession of plaintiff in error, Ng Choy Fong, or any of it, was imported into the United States after April 1st, 1909. Nor for that matter is there one shred of evidence that any of the opium was imported at all. For aught that appears in the record the opium may have been imported prior to April 1st, 1909, or it may have been produced in this country.

So too there was no evidence whatsoever as to the guilty knowledge of the defendant Ng Choy Fong. It does not appear that Ng Choy Fong knew whether the 660 five-tael cans were imported before or after the first of April, 1909. In fact

it does not appear that she knew whether the opium had been imported at all. Just as there was no evidence as to the nature of the opium in respect to whether it had been imported or produced in this country; just as there was no evidence as to the date of importation, if it was imported, so too there was no evidence as to any knowledge or belief on the part of Ng Choy Fong as to the importation or production of the 660 five-tael cans.

It is contended by defendant in error that it was not necessary for the prosecution to prove any more than that the plaintiff in error had smoking opium in her possession after the first of July, 1913. It argues that by Section 3 of the Act of February 9th, 1909, this opium would be presumed to have been imported after April 1st, 1909, and that by Section 2 possession of such opium would be sufficient evidence to authorize conviction unless the accused explain the possession to the satisfaction of the jury.

Plaintiff in error contends that mere proof that she had smoking opium in her possession after the first of July, 1913, is insufficient to justify a verdict of guilty of the crime charged against her. She contends that the prosecution must show not only that the opium she had was imported but that it was imported after the first of April, 1909; and further the prosecution may show that she had knowledge of these facts.

The crux of the case is this—

The prosecution contends that from possession of smoking opium the Act requires it to be presumed that the opium was imported, and imported after April 1, 1909, and that the one having possession had knowledge that it was imported after that date.

Plaintiff in error contends the Act is unconstitutional in raising these presumptions in that it deprives plaintiff in error of the presumption of innocence guaranteed by the due process clause and tends to force her to be a witness whether she wishes to or not.

II. THE ACT OF FEBRUARY 9th, 1909, VIOLATES THE PRESUMPTION OF INNOCENCE GUARANTEED BY THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN RAISING, FROM THE POSSESSION OF SMOKING OPIUM AFTER JULY 1st, 1913, THE PRESUMPTION THAT IT WAS IMPORTED AFTER APRIL 1st, 1909, AND THAT THE ONE HAVING POSSESSION HAD KNOWLEDGE THAT IT WAS IMPORTED AFTER JULY 1st, 1913.

It is a well established principle of law that one charged with a crime is presumed innocent until he is proved guilty beyond a reasonable doubt. As stated in United States v. Richards, 149 Federal, 443, at page 454:

> "In determining the guilt or innocence of each defendant in this case, you must be convinced beyond a reasonable doubt that he has committed the offense or offenses charged

> in order to convict him. Each and every fact necessary to constitute the offense must be so proven; that is, beyond a reasonable doubt. Until guilt is proven, there is an absolute presumption of innocence; and this presumption of innocence continues with the defendant throughout the trial, and stands as sufficient evidence in his favor until from the whole evidence you are satisfied beyond a reasonable doubt of his guilt."

Or, as stated by "Bradner on Evidence" at page 460:

> "The presumption of innocence is not a mere phrase without meaning; it is in the nature of evidence for the defendant; it is irresistible as the heavens till overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with every part and parcel of the evidence."

This presumption of innocence has always been one of the fundamental bases of the common law. It is not however confined to the common law, but existed as an axiomatic and elementary principle of other systems. No better treatment of this subject can be found than in the opinion of our present Chief Justice White, rendered on behalf of the Supreme Court of the United States in Coffin v. United States, 156 U. S. 432. He said in part, at pages 453 seq.:

> *"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.*

It is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States. (Citing authorities.)

Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Greenl. Ev. part 5, section 29, note. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:

'Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day.' Code, L. IV, T. XX, 1, 1. 25.

'The noble *(divus)* Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent.' Dig. L. XLVIII, Tit. 19, 1. 5.

'In all cases of doubt, the most merciful construction of facts should be preferred.' Dig. L. L. Tit. XVII, 1. 56.

'In criminal cases the milder construction shall always be preserved.' Dig. L. L, Tit. XVII, 1. 155, s. 2.

'In cases of doubt it is no less just than it is safe to adopt the milder construction.' Dig. L. L, Tit. XVII, 1. 192, s. 1.

Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial

was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?' Rerum Gestarum, L. XVIII, c. 1. The rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the cannon law. Decretum Gratiani de Presumptionibus, L. II, T. XXIII, c. 14, A. D. 1198; Corpus Juris Canonici Hispani et Indici, R. P. Murillo Velarde, Com. 1, L. II, n. 140. Exactly when this presumption was in precise words stated to be a part of the common law is involved in doubt. The writer of an able article in the North American Review, January, 1851, tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's Evidence (1802). Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time.

Fortescue says: 'Who, then, in England can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favor of life; none but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty persons should

escape the punishment of death than that one innocent person should be condemned and suffer capitally.' De Laudibus Legum Angliae, Amos' translation, Cambridge, 1825.

Lord Hale (1678) says: 'In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die.' 2 Hale P. C. 290. He further observes: 'And thus the reasons stand on both sides, and though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger. *quod dubitas, ne faceris.* 1 Hale P. C. 24.

Blackstone (1753-1765) maintains that 'the law holds that it is better that ten guilty persons escape than that one innocent suffer.' 2 Bl. Com. c. 27, margin page 358, *ad finem.*

How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in *McKinley's case* (1817), 33 St. Tr. 275, 506, where Lord Gillies says: 'It is impossible to look at it (a treasonable oath which it was alleged that McKinley had taken) without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be reargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be

> inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty.' ''

This axiomatic and elementary principle, lying as stated by Chief Justice White, "at the foundation of the administration of our criminal law", was at the time of the adoption of the Constitution of the United States and at the time of the adoption of the first ten amendments thereto—the American Bill of Rights—a fixed, essential and fundamental part of "the law of the land". As stated by Chief Justice White, "it has existed in the common law from the earliest time". It was one of those rights jealously and zealously guarded by the English in their contests with the crown. It was guaranteed by the 39th chapter of the Magna Charta of King John, providing that "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall any go upon him, nor send upon him, but by the lawful judgment of his peers *or by the law of the land*". Again, in the reissues of the Great Charter under Henry the Third, (2 Hen. III A. D. 1217, and 9 Hen. III A. D. 1225), the presumption of innocence was guaranteed an accused by a similar provision. And in like manner this protection to the accused was guaranteed again and again by various English monarchs by assurances that no

one would be imprisoned except by trial conducted according to the "law of the land".

As the English forced charters and bills of rights and similar assurances from their sovereigns, in the formation of the United States and the adoption of our Constitution the people forced into the Constitution the ten amendments or the American Bill of Rights. As stated by McGehee "Due Process of Law" at pages 17 and 18:

> "The first ten amendments to the Federal Constitution were a concession to the fears of a generation which had taken part in the Revolution. The struggle with England for rights, held to be the sacred inheritance of all free English subjects, had left the States and the people of the country keenly alive to the value of liberty and profoundly jealous and distrustful of centralized power. The feeling was widespread that under the Constitution as proposed the States were weakened and a place left for encroachments which might in time end in their absorption into the Federal Government. Under these circumstances ratification of the Constitution by the requisite number of States was secured only by an understanding that amendments would be adopted declaring the rights of the people and restricting the powers of the general government. In pursuance of this understanding a proposition to amend the Constitution was brought forward by Mr. Madison in the First Congress, and the first ten amendments were framed, and ratified by the requisite number of States in December, 1791."

As the Magna Charta, bills of rights, and similar assurances secured to the English a guaranty that no one should be imprisoned without a trial

conducted according to the "law of the land", so the Constitution of the United States in the Fifth Amendment thereto secures to the people of the United States a guaranty that no one shall be deprived of liberty without "due process of law". The same thing is comprehended by the terms "law of the land" and "due process of law". As stated by McGehee in his work above referred to,

> "The equivalence of the two phrases, 'law of the land' and 'due process of law', assumed by Cooke, has been universally stated upon his authority by American courts, and has become an established rule of interpretation."

The guaranty of a trial according to "the law of the land" or by "due process of law" in regard to criminal proceedings secured to an accused as an inviolable right the benefit of those rules of the common law by which judicial trials are regulated. In so far as action by Congress is concerned the Fifth Amendment places this right beyond reach of legislative subversion and makes it a part of the paramount law.

One of the benefits or rights accorded an accused, as pointed out by Chief Justice White is that he shall be presumed innocent until proved guilty beyond a reasonable doubt. When Congress attempts to violate this presumption it attempts to deprive an accused of one of those benefits accorded by the common law and guaranteed by the "due process" clause. Consequently such an attempt on the part of Congress would be unconstitutional and void.

This principle was laid down at an early date by Judge Cooley. In his treatise on "Constitutional Limitations" he points out that an accused cannot be deprived of the benefit of the presumption of innocence by any action of the legislative authority. He says at star page 309:

> "Perhaps the most important of the protections to personal liberty consists in the mode of trial which is secured to every person accused of crime. At the common law, accusations of felony were made in the form of an indictment by a grand jury; and this process is still retained in many of the States, while others have substituted in its stead an information filed by the prosecuting officer of the State or county. The mode of investigating the facts, however, is the same in all; and this is through a trial or jury, surrounded by certain safeguards which are a well understood part of the system, *and which the government cannot dispense with.*
>
> *First, we may mention that the humanity of our law always presumes an accused party innocent until he is proved to be guilty.* This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact."

In the case at bar the crime charged against plaintiff in error is that she knowingly concealed smoking opium imported into the United States after April 1st, 1909. According to the rules of common law, the benefits of which are guaranteed by the "due process" clause, she would be presumed innocent until proved guilty beyond a reasonable

doubt. But Congress attempts to say that if it be proved that plaintiff in error had smoking opium in her possession then it will be presumed that she is guilty—it will be presumed that the opium was imported and that it was imported after April first, 1909, and it will be further presumed that plaintiff in error had knowledge of these facts. If plaintiff in error does not wish to be convicted then she must show to the satisfaction of the jury that the opium was not imported or that it was imported before April 1st, 1909, or that she had no knowledge of when it was imported or where produced. In other words. Congress attempts to subvert the presumption of innocence, to deprive plaintiff in error of those benefits granted an accused by law, and guaranteed by the due process clause of the Fifth Amendment.

There are a number of instances in the books where legislative bodies have endeavored to violate the presumption of innocence on the part of the accused by raising, as in the case at bar, upon the establishment of certain facts presumptions of guilt against the accused.

In Wynehamer v. The People, 13 N. Y. (3 Kernan) 378-488, it appeared that Wynehamer, the defendant below, was convicted of selling intoxicating liquors contrary to the provisions of a statute of the State of New York entitled "An Act for the prevention of intemperance, pauperism and crime," (Laws of 1855, page 340). The Act did not prohibit the safekeeping of liquor or the giving

it away in a private family. It made the sale of it (except in a few exceptional instances) unlawful. Despite the fact that the ostensible force of the Act was directed against the sale of liquor, Section 17 of the Act provided that proof of delivery should be *prima facie* evidence of sale, and proof of sale should be sufficient to sustain an averment of an unlawful sale.

The court held this provision unconstitutional on the ground that it deprived a defendant of liberty without due process in that it violated the presumption of innocence guaranteed by the due process clause of the Constitution. Justice Selden, in rendering his concurring opinion, said in this behalf at pages 444 through 447:

> "But a point of still greater interest arises upon the first branch of Section 17, which provides that, 'upon the trial of any complaint commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale.' There are two classes of cases upon which this provision operates with great severity. Although the act does not prohibit the safe keeping of spirituous liquor or the giving it away in a private dwelling, yet by this clause the mere delivery is made *prima facie* evidence of an unlawful sale, without exception as to place. No one, therefore, can in his own house give a glass of wine to a friend, without thereby affording *prima facie* evidence to convict him of a misdemeanor. Other portions of the act purport to respect the sanctity of the private domicil of the citizen; but its innermost recesses are pene-

trated by this provision, and acts of mere kindness or courtesy are converted into proofs of guilt.

But the operation of the section upon another class is equally onerous; I mean the class of licensed vendors. Sections 2 and 3 expressly authorize certain persons to sell who are required to give ample security not to violate any provision of the act, and yet, by force of the clause in question, every sale they make affords *prima facie* evidence to convict them. The act presumes against the innocence of its own selected agent, and will not permit this presumption to be rebutted until such agent consents to make himself a witness in the case. This provision raises the vital question, as to the value of that clause in the constitution which secures to every man charged with crime a trial by 'due process of law.' The most important guarantees of individual right which our constitution affords are concentrated in this single phrase. As we have already seen, the expression, 'due process of law,' first appeared in a statute of Edward III. as a paraphrase of the words, 'by the law of the land,' *per legem terroe* in Magna Charta; and from that day to this both forms of expression have been held to refer to the common law, as distinguished from statutory enactment. Sir Matthew Hale says: 'The common law is sometimes called, by way of eminence, *lex terroe* as in the statute of Magna Charta (chap. 29), where certainly the common law is principally intended by those words *aut per legem terroe,* as appears by the exposition thereof in several subsequent statutes, and particularly in the statute of 28 Edward III. (ch. 3), which is but an exposition and explanation of that statute'. (1 Hale's Hist. Com. Law, 128). Lord Cooke also, in his commentary upon Magna Charta, puts the same construction upon the words. (2 Ins., 45, 50.) The courts in

this country have held the same. Chief Justice Ruffin, speaking of this clause in the constitution of North Carolina, in the case of *Hoke v. Henderson* (4 Dev. 1), says that 'such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usage of the common law, as derived from our forefathers, are not effectually laws of the land for these purposes.' To the same effect is the language of Judge Bronson, in *Taylor v. Porter* (4 Hill, 140), where, in speaking of Section 1, art. 7, of the constitution of 1821, he says 'The meaning of the section, then, seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him, upon trial had according to the course of the common law.'

If this interpretation is correct, and it is sustained as well by history as by judicial authority, the clause in question was intended to secure to every citizen the benefit of those rules of the common law by which judicial trials are regulated, and to place them beyond the reach of legislative subversion. They are, indeed, virtually incorporated into the constitution itself, and made thereby a part of the paramount law. Trials, therefore, at least such as are criminal, are to be regulated and conducted, in their essential features, not by statutes, but by common law. This the constitution guarantees. Precisely how far the legislature may go, in changing the modes and forms of judicial proceeding, I shall not attempt to define; but I have no hesitation in saying that they cannot subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is

proved guilty. This rule will be found specifically incorporated into many of our state constitutions, and is one of those rules which, in our constitution, are compressed into the brief but significant phrase, 'due process of law.'

Can Section 17 be reconciled with this rule? It provides that, upon every prosecution under the act, proof of a sale of liquor shall sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of a sale. It is plain that at common law the legal presumption would be directly the reverse of that declared by the act. Where the common law would presume innocence, this act presumes guilt. Either the guarantee of a judicial trial, according to the course of the common law, is a nullity, or this provision is void. *But I am prepared to go further, and to hold that all those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by the constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are of course in their nature unchangeable. If it does not follow that to determine what they are, as applicable to judicial proceedings, is a judicial and not a legislative power, still they must necessarily be included in the phrase, 'due process of law.' If this be not the true interpretation of the constitution; if the legislature, in addition to declaring what acts and what intentions shall be criminal, can also dictate to courts and juries the evidence, and change the legal presumptions upon which they shall convict or acquit, there is no barrier to legislative despotism; and the separation of the legislative and judicial departments of the govern-*

> *ment, the guarantee of trial by jury, and of a trial according to the course of the common law, have all failed to afford any substantial security to individual rights.''*

In State v. Beswick, 13 Rhode Island, 211, it appeared that General Assembly of Rhode Island (the legislative body of that state) had enacted a law prohibiting the keeping of liquors with intent to sell the same in that state and making a violation of the law a criminal offense. The law further provided that it was not necessary to prove an actual sale of liquor in any particular premises in order to establish that liquors were kept there for sale, but that the notorious character of any such premises or the notoriously bad or intemperate character of persons frequenting the same *or the keeping of implements or appurtenances usually appertaining to grog-shops or places where liquors are sold, shall be prima facie evidence that liquors are kept on such premises for the purpose of sale within the State.*

The court held that the provision in question was unconstitutional and void in that it violated the presumption of innocence guaranteed an accused by "the due process of law'' clause. The court said in part at page 216 seq.:

> "The question then is, whether a statute is constitutional which makes it the duty of a jury, empanelled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon simple proof that his place of business is notorious as a place where liquors are unlawfully kept for sale, or upon simple

proof that the place is frequented by persons of notoriously bad or intemperate character, or upon proof that he has there the implements and appurtenances of a grog-shop or tippling-shop, without more, unless there be other evidence to rebut or control it.

We have very carefully considered the question, and have come to the conclusion that the statute is not constitutional. It virtually strips the accused of the protection of the common law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not 'be deprived of life, liberty, or property, unless by the judgment of his peers of the law of the land.' What is meant by 'the judgment of his peers' is the judgment of a jury, and certainly the accused does not have the *judgment* of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him. Suppose that the General Assembly were to enact that if any person were generally reputed to be guilty of a murder it should be *prima facie* evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty had been taken from him by the *judgment* of his peers? We think not. The judgment of the jury would not have been taken on the question of his guilt, but only on the question whether or not he was generally reputed guilty. So under the statute here a man may be convicted of unlawfully keeping

intoxicating liquors for sale, upon proof that his place of business is generally reputed to be a liquor shop, without the jury's actually passing any judgment on the question of his guilt.

The provision is that the accused shall not be deprived of his life, liberty, or property, 'unless by the judgment of his peers *or* the law of the land.' It may be argued that even if the accused does not have the judgment of his peers he is nevertheless convicted by 'the law of the land.' This phrase has a historical origin. It was borrowed from *Magna Charta,* and, as has been repeatedly decided, means the same as 'due process of law.' The question then is, whether if a man is convicted on the testimony indicated, and under the rule prescribed by the statute, he is convicted according to 'due process of law.'

The answer to the question depends on the meaning of the phrases 'due process of law' and 'the law of the land.' The phrases have never received a perfectly satisfactory definition. One or the other of them occurs in all or nearly all the constitutions of the several States and in the Constitution of the United States, and it is well settled that the provisions in which they occur were intended to operate as limitations on the legislative power of the several States and of the United States. It follows, if the provision is a limitation on the legislative power, that a legislative enactment is not necessarily 'the law of the land,' even when it does not conflict with any other provision of the Constitution, and that a proceeding according to a legislative enactment is not necessarily 'the law of the land,' even when it does not conflict with any other provision of the Constitution, and that a proceeding according to a legislative enactment is not necessarily 'due process of law.' It is also settled that these provisions secure to every citizen, except

in the matter of taxation, a judicial trial before he can be deprived of life, liberty or property. The definition of 'due process of law' given by Judge Edwards in *Westervelt v. Gregg,* 12 N. Y. 202, 209, is quoted by Judge Cooley in his work on Constitutional Limitations, *355, with approval, and is in our opinion not only concise but very accurate. 'Due process of law undoubtedly means,' he says, 'in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' *The effect in criminal prosecutions is to secure to the accused, before condemnation, a judicial trial, if not strictly in all points according to the common law, at least not in violation of those fundamental rules and principles which have been established at common law for the protection of the subject or the citizen. Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proved guilty.* 'This rule,' said Judge Selden, in The People v. Toynbee, 2 Park. Cr. 490, 526, 'will be found specifically incorporated into many of our state constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase 'due process of law.' *'Indeed to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defence left to him,*

and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testify in his own behalf; and the right to testify in his own behalf having been granted, can be abrogated, by the legislature. It is not one of those great and immemorial rights which lie embedded in the phrase 'the law of the land.'"

In People v. Lyon, 34 N. Y. Sup. Ct. Rep. (27 Hun) 180, it appeared that after the decision of the New York Court of Appeals in Wynehamer v. People (supra) that the Legislature enacted a new law regulating the sale of liquors. This law authorized the issuance of licenses for the sale of liquors in quantities less than five gallons but prohibited them to be drunk on the premises where sold. It further provided that "whenever any person is seen to drink in any such shop—any spirituous liquors or wines forbidden to be drunk therein, it shall be *prima facie* evidence that such spirituous liquors or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drunk therein".

The New York court held that the latter provision of the law was void and unconstitutional in that it attempted to deprive an accused of the benefit of the presumption of innocence. The court said in part, at page 182 seq.:

> "In the present case the defendant is charged with having sold liquors with intent that they should be drunk on the premises. It is his right to have the question, whether he did

so or not, tried by a jury. That means that the jury are to determine, from their own judgment upon the facts legally given in evidence, whether or not the defendant is guilty. If the legislature can declare that a certain fact is *prima facie* evidence of the defendant's guilt, such a declaration means that the jury must convict, unless the defendant explains away this evidence; and if they can declare a fact to be *prima facie,* it would seem to follow that they might declare it conclusive evidence.

Undoubtedly in many instances, (very possibly in this instance,) drinking on the premises might take place under such circumstances that the jury, (and any sensible man,) would be satisfied that the liquor must have been sold by the defendant with intent, etc. And all the denial of the defendants might fail to overcome, in any fair mind, the weight of the circumstances. But this clause of the statute must stand, if at all, irrespective of any natural tendency in the fact of such drinking to convince a jury of the defendant's guilt. To illustrate, if the legislature can legally enact such a clause, they might enact that the drinking of liquors a mile distant from such a house, or shop, should be *prima facie* evidence of a sale in such house, or shop, with intent that the liquor so sold should be drunk on the premises. Or again; they might enact that if a dead body were found in any house, that should be *prima facie* evidence that the occupant of the house had murdered the deceased. Because the legislative enactment is merely arbitrary, and need have no regard to the connection, or want of connection, between the evidence and the conclusion which is to be proved.

It is urged on the part of the people that this clause of the statute is but analogous to certain common-law presumptions; such for instance as that the possession of recently

stolen property affords a presumption that the possessor is guilty of the larceny. (Wills' Circ. Ev., 53; Knickerbocker v. People, 43 N. Y. 177). But this presumption is only the natural inference which the jury may properly draw from circumstances with which the party accused is connected. (3 Greenl. Ev., Sec. 31.) On the contrary this clause of the statute declares a fact, with which the accused is not necessarily connected, to be *prima facie* evidence of an illegal act of the accused and of the intent with which it was done. Thus this clause comes within the condemnation expressly by Judge Selden, in Wynehamer v. People (13 N. Y., at pages 444 and seq.)

The learned judge who tried this case did not rest his charge on the presumption, which might arise from the circumstances under which these persons drank liquors in the water-closet, that the defendants must have sold the liquors with intent, etc. But he rested on this statute as making a rule of evidence applicable to these cases. And hence the question arises directly on the power of the legislature thus to control the effect of evidence on the minds of the jury.

In State v. Beswick (13 R. I. 211; 23 Alb. Law Jour. 487), a statute came up for discussion, which declared that the notorious character of the premises, or the bad character of persons frequenting them, should be *prima facie* evidence that liquors were kept there for sale. The court held that the statute was unconstitutional, as violating the provision that one should not be deprived of life, liberty or property except by the judgment of his peers or the law of the land. They held that the statute took away the right of the jury to pass judgment on the guilt of the accused. And, again, that to hold that the legislature could create artificial presumptions

> of guilt was to take away from a judicial trial the very element which makes it judicial."

In State v. Divine, 98 N. C. 778; 4 S. E. 477, it appeared that the Code of North Carolina, Section 2329, provided that whenever any livestock should be killed by the engine or cars on any railroad, and such killing is proved, it should be *prima facie* evidence of negligence in any indictment therefor against the conductor or engineer of the train which did the killing, or certain named officers of the railroad.

The Supreme Court of North Carolina held this provision unconstitutional in that it subverted the presumption of innocence, and thereby deprived the defendant of his liberty without due process of law. The court said in part, at 4 S. E., page 482:

> "Looking at the indictment, it will be seen that the only material allegations are that the prosecutor's cattle were killed by a running train on the road of the company of which the defendant is superintendent, without connecting him with the act, and scarcely more definite is the special verdict. Do these words impute crime? and upon mere proof of these facts is the charge established? and must the defendant be convicted unless he repels the negligence which the statute presumes in the subordinates in managing the train? The very question involves an answer, unless all the safeguards thrown around one accused of crime are disregarded, and he left without their protection. * * * Judge Cooley in his work on Constitutional Limitations, at page 309, referring to a trial for criminal offenses of different grades, uses this impressive language: 'The mode of investigating the facts, however,

> is the same in all, and this is through a trial by jury, surrounded by certain safeguards, which are a well understood part of the system, and which the government *cannot dispense with;'* meaning, as we understand, that the charge must go before the jury, and the guilt of the accused proved to them, with the presumption of innocence until this is done. In *Cummings v. Missouri,* 4 Wall. 328, Mr. Justice Field, referring to certain enactments in that state, says: 'The clauses in question subvert the presumption of innocence, and alter the rules of evidence which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable.' 'But I have no hesitation in saying', remarks Selden, J. in Wynehamer v. People, 13 N. Y. 446, 'that they (the legislature) cannot subvert that fundamental rule of justice which holds that every one shall be *presumed innocent until he is found guilty.'* "

In the matter of Wong Hane, 108 Cal. 680; 41 Pac. 693; 49 A. S. R. 138, the Supreme Court of the State of California reached a similar decision in regard to an ordinance of the City of Los Angeles declaring it unlawful for any person to have in his possession any lottery ticket unless it be shown that such possession is innocent or for a lawful purpose. The court held the ordinance unconstitutional and invalid in that it assumed to overthrow the presumption of innocence, saying in part at 108 Cal., page 682:

> "The ordinance, however, throws upon the defendant the burden of proving his innonence, and by its terms, unless he shows that his possession is lawful or innocent, his mere posses-

> sion of the ticket renders him liable to punishment. If there are any circumstances under which the possession of a lottery ticket may be lawful or innocent, a defendant who is charged with the offense of having such ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant is required to establish his innocence, the provisions of the ordinance violate his constitutional rights."

So too, the Supreme Court of Oregon, in Ex parte Kameta, 36 Ore. 251; 60 Pac. 394, held a similar ordinance of the City of Portland void in that it put on the defendant the burden of proving his innocence. The court said in part, at 60 Pac., page 395:

> "The objection, however, that the ordinance in question is void because it assumes to overthrow the presumption of innocence, and put upon the defendant the burden of showing that his possession of lottery tickets is lawful or innocent, is well taken. Such an objection was held fatal to an ordinance quite identical in language with the one before us by the supreme court of California in Re Wong Hane, 108 Cal. 680, 41 Pac. 693, and the reasoning of the court in that case being, in our opinion, conclusive, renders unnecessary any further examination of the question by us. It follows, therefore, that the judgment of the court below must be affirmed, and it is so ordered."

Likewise this principle has found expression by the Supreme Court of the United States. In Cummings v. Missouri, 71 U. S. (4 Wall.) 277, at 328, Justice Field puts the Supreme Court on record in the following words:

> "And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."

It is submitted that these authorities establish the proposition that a law making the proof of certain facts presumptive of the guilt of the accused, unless the accused disprove his guilt, is unconstitutional and void as depriving the accused of liberty without due process of law. The "due process clause" guarantees to an accused the benefits of a trial conducted according to the rules of common law. As pointed out by Chief Justice White, one of those benefits, recognized as axiomatic and elementary and lying at the foundation of our criminal procedure, is the presumption of innocence.

So the Act of February 9th, 1909, in making the possession of smoking opium presumptive of the guilt of the accused unless the accused explain that possession to the satisfaction of the jury is unconstitutional in that it subverts the presumption of innocence. The mere possession of smoking opium, without more, is not a crime. Neither is it necessarily an essential part of the crime. In fact no power exists in Congress to make the mere pos-

session of smoking opium a crime. That power belongs to the police power of the several states. The crime is the possession of smoking opium imported after April 1st, 1909, with knowledge that the opium was imported after that date. And Congress cannot make mere possession of smoking opium proof of that crime without changing the fundamental basic rules of criminal procedure rendered inviolable by the Fifth Amendment.

III. THE ACT OF FEBRUARY 9th, 1909, IN REQUIRING ONE FOUND IN THE POSSESSION OF SMOKING OPIUM TO PROVE TO THE SATISFACTION OF THE JURY THAT IT WAS NOT IMPORTED AFTER APRIL 1st, 1909, OR THAT THE POSSESSOR DID NOT HAVE KNOWLEDGE THAT IT WAS IMPORTED AFTER THAT DATE OR BE ADJUDGED GUILTY IS VIOLATIVE OF THE PROVISION OF THE FIFTH AMENDMENT THAT "NO PERSON SHALL * * * BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF."

The rule that one should not be compelled to be a witness in a criminal case against himself, said Mr. Justice Brown, in Brown v. Walker, 161 U. S. 591, at 596-7:

> "had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confes-

sions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

The Act of February 9th, 1909, makes it a crime for one to knowingly conceal opium imported into the United States after April 1st, 1909. Congress derives its power to pass this Act from the power to regulate commerce.

Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. Rep. 285.

But the Act purports to go further than this. It purports to say to one found after July 1st, 1913, in the possession of smoking opium: "You explain to the satisfaction of the jury that this opium was not imported, or if it was imported that it was imported before April 1st, 1909, or that you didn't know that it was imported after April 1st, 1909, or you will be adjudged guilty". In other words, it attempts to say to one found in the possession of smoking opium: "You take the witness stand and explain your possession of this opium—whether it was imported or not, and when, if it was—or be adjudged guilty of knowingly concealing opium imported after April 1st, 1909". It attempts to force a defendant admittedly in the possession of smoking opium, to be a witness in a criminal proceeding against himself at the peril of being adjudged guilty of a crime not established against him.

Similar acts have been passed upon by Federal and State courts of this country. In Boyd v. United States, 116 U. S. 616; 6 Sup. Ct. Rep. 524; 29 L. ed. 746, the Supreme Court of the United States held that the Act of Congress of June 22nd, 1874, c. 391, Sec. 5 (18 Stat. L. 187) authorizing an order in revenue cases requiring the defendant or claimant therein to produce his private books, invoices, and papers, or else the allegations of the government's attorney will be taken as confessed, was void as violating the provisions of the Fifth Amendment prohibiting anyone being compelled

to be a witness in a criminal proceeding against himself. The court said in part, at 29 L. ed. at page 752:

> "In this very case, the ground of forfeiture as declared in the twelfth section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding $5,000, nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the claimants (that is, civil in form) can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, *or as an alternative, a confession of guilt. This cannot be.*"

Is Congress not attempting to do the identical thing in the case at bar as in Boyd v. United States? In the Act, passed on in that case, it said to the defendant in a proceeding instituted under the Act: "You produce your books and invoices and papers or you will be adjudged guilty of defrauding the government of duties, and the property upon which duties are alleged not to have been paid will be forfeited". In the Act of February

9th, 1909, it says to one in the possession of smoking opium, "You take the stand and explain your possession of this opium to the jury's satisfaction—establish that it was not imported or was imported before April 1st, 1909, or that you had no knowledge that it was imported after that date—or you will be adjudged guilty of having concealed smoking opium knowing that it was imported after April 1st, 1909".

There is no material difference between the two Acts in this respect. In both Congress is attempting to prescribe by statute a rule of evidence that would operate disadvantageously to one who refused to be a witness against himself. And this was decided by Boyd v. United States to be in violation of the guaranty of the Fifth Amendment that no one should be compelled to be a witness against himself in a criminal case. As was said by Judge Hammond of the United States Circuit Court in discussing Boyd v. United States, in United States v. Bell, 81 Fed. 830, at page 836:

> "In Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, it was distinctly held that it is sufficient compulsion to bring a case within the prohibition of the fifth amendment to the constitution of the United States that a rule of evidence prescribed by statute would operate disadvantageously to him in the event the citizen refused to obey an unlawful order to produce evidence against himself, it being held that it is equivalent to the compulsory production of papers to make the non-production of them a confession of the allegations which it is pretended they will prove; and in the concurring opinion Mr. Justice Miller says:

> 'Though the penalty for the witness' failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be more severe, namely, to have charges against him of a criminal nature taken for confessed, and made the foundation of a judgment of the court. That this is within the protection which the constitution intended against compelling a person to be a witness against himself is, I think, quite clear.'

And he placed the decision in that case upon the ground that it was a violation of the fifth amendment to the constitution of the United States, that no person shall be compelled in any criminal case to be a witness against himself, and that it was not a case of the unlawful seizure and search of private papers, in violation of the fourth amendment. The chief justice agreed in this view, while the other members of the court thought it was a violation of both these amendments. Whatever may be thought of this difference of opinion, the case establishes beyond doubt that the compulsion prohibited by the fifth amendment is not alone physical or mental duress, such as comes from unlawful commands and authoritative orders by those engaged in extorting testimony, *but comprehends also that lesser degree of compulsion which subjects the citizen to some important disadvantage by the use of means to procure the evidence which it is desired should be extracted from him.*"

Similar decisions have been reached by the courts of New York in passing upon a similar statute. In Peck v. Cargill, 167 N. Y. 391; 60 N. E. 775; 53 L. R. A. 888, the State Commissioner of Excise instituted a statutory proceeding against the defend-

ant to revoke a liquor tax certificate issued to the defendant. The statute authorizing the proceeding (Laws of New York, 1896, Chapter 112) further provided that after service of a petition to revoke a liquor tax certificate and an order to show cause, the judge may revoke the certificate unless the holder files a verified answer raising an issue as to some material point in the petition. The New York Court of Appeals held that the liquor tax certificate was property and not a mere license and that as the proceeding was for the forfeiture of property it was criminal in nature and that the constitutional prohibition against compelling one to be a witness against himself in a criminal proceeding applied. The court then held that the statutory provision above described violated this constitutional prohibition, saying in part, at 60 N. E., at pages 776-777:

> "It is plain that what the statute practically provides for is that in such cases the accused shall be presumed to be guilty unless he denies his guilt under oath. If he omits to deny the statements of the petition on oath, the facts charged are to be taken as confessed, and a forfeiture follows. If the party against whom the proceeding is instituted is really guilty of the offense charged, he is thus compelled to confess his guilt, either by his oath or by silence, and then the forfeiture of his property rights follows. He has no other alternative, unless he is tempted to tamper with his conscience and deny the truth on oath. It is not competent for the legislature to place a citizen in such a disadvantageous position in order to protect his liberty or his property. In any proceed-

ing by the state to deprive him of the one or the other, the facts which in law justify it must be alleged and established. The legislature has no power to enact that they may be inferred or presumed from the silence of the party accused, or from his failure to answer under oath. This is especially true when the acts charged are not only the basis of a penalty or a forfeiture, but constitute a crime. It is the constitutional right of the party charged with the commission of acts which, if true, constitute a crime or create a penalty or impose a forfeiture, to answer without verification. No law can be valid which directly or indirectly compels a party to accuse or incriminate himself, or to testify by affidavit or otherwise with respect to his guilt or innocence. In every case when he elects to remain silent with respect to any charge involving unlawful acts which are criminal or subject him to a penalty or forfeiture, that is a constitutional privilege which the legislature may not invade. The courts have insisted upon giving to the constitutional provision a construction broad and liberal enough to permit a citizen to remain entirely silent with respect to the truth or falsity of any criminal charge against him, if he so elects, and his right to refuse to verify a pleading is as clearly within the privilege as his right to refuse to testify. The constitutional immunity from every species of incrimination may be as effectually violated by a law which compels a person to plead or deny upon oath any charge involving a criminal offense, without regard to the form of the investigation, as by a law compelling him to testify as a witness. The privilege of silence secured by the constitution applies to the one case as well as the other. (Citing authorities.) The principles decided in these cases establish the proposition that it was

> not within the power of the legislature to dispense with the necessary allegations and proof of the facts constituting the offense by enacting virtually that no proof need be given by the state unless the party charged with the violation of the law denies the charges under oath. *The statute virtually authorizes a presumption of guilt from an omission of the accused to testify, and therefore it is a law adjudging guilt without evidence, and reverses the presumption of innocence. An enactment of this character violates fundamental principles* binding alike upon the legislature and the courts."

A similar decision was made and the above quoted paragraph was quoted with approval by the Supreme Court of New York in Matter of Cullinan, 82 N. Y. App. Div. 445; 81 N. Y. S. 567; and again in Matter of Cullinan, 40 Misc. Rep. 423; 82 N. Y. S. 337, the New York Supreme Court approved of Peck v. Cargill.

What distinction can be made between the New York Statute and the Act of February 9th, 1909? The New York Statute said to the holder of the liquor tax certificate sought to be revoked, "You file a verified denial of the allegations of the State Excise Commissioner's petition or your property will be taken from you". The Act of February 9th, 1909, says to one in possession of smoking opium, "You explain your possession to the satisfaction of the jury—prove that this opium was not imported or was imported before April 9th, 1909, or that you didn't know that it was imported after that date—or you will go to jail". Both enactments, as stated by the New York Court in Peck v.

Cargill, "virtually authorize a presumption of guilt from an omission of the accused to testify, and therefore laws adjudging guilt without evidence, and reverse the presumption of innocence". And it is submitted, as further stated by the New York court in that case, "Enactments of this character violate fundamental principles binding alike upon the legislatures and the courts".

IV. CONCLUSION.

It will undoubtedly be urged by the government, as stated by the trial judge in his instructions to the jury assigned herein as error, that the provisions of the Act of February 9th, 1909, making the possession of smoking opium presumptive of the accused being guilty of having concealed smoking opium, "are made a part of the law because of the difficulty of proving guilty knowledge" (Tr. page 90). This argument has been relied on in similar cases, but always repudiated. As said in People v. Reardon, 124 N. Y. App. Div. 818; 109 N. Y. S. 504, at 507 (affirmed in 197 N. Y. 236; 90 N. E. 829; 134 A. S. R. 871; 27 L. R. A. (N. S.), 141):

> "It is undoubtedly true that without the right of search it will be difficult to discover and punish violations of the act taxing stock sales; but that consideration will not serve to uphold an act plainly violative of the Constitution and of the right of individual liberty and immunity which constitutes the very cornerstone of our political structure."

So in the case at bar, while it may be difficult for the government to discover and punish violations of the opium statute without the use of these presumptions, that difficulty cannot be made a justification for subverting the Constitutional right of an accused to be presumed innocent until proved guilty beyond a reasonable doubt guaranteed by the due process clause—or for overthrowing the constitutional privilege of an accused not to be compelled to be a witness against himself. The question is not whether it will be difficult for the government to convict without the aid of these presumptions. The question is Do these presumptions violate the constitutional rights of the accused? And in considering this question the attitude of the court should be that indicated by the United States Supreme Court in Boyd v. United States (supra):

> "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be 'obsta principiis'. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a just presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

Dated, San Francisco,
February 26, 1917.

Respectfully submitted,

GEORGE J. HATFIELD,
Attorney for Plaintiff in Error.